United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-2058

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In The

United States Court of Appeals

For The Second Circuit

SAMUEL PARKINSON as Custodian for ANDREW PARKINSON, JONATHAN STAEBLER and PETER MYGATT,

Plaintiffs-Appellees,

- against -

APRIL INDUSTRIES, INC., ARTHUR FEDER, MORRIS DEMEL, NATHAN APTEKAR and STANLEY SILVER,

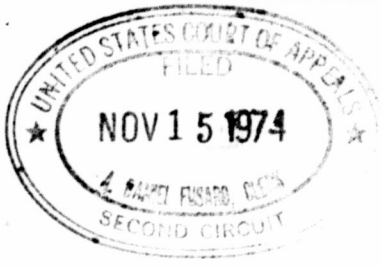
Defendants-Appellants,

and

ALEX M. PARKER,

Defendant.

APPELLANTS' BRIEF



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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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SAMUEL PARKINSON as Custodian for ANDREW PARKINSON, JONATHAN STAEBLER and PETER MYGATT,

Plaintiffs-Appellees,

-against-

Docket No. 74-2058

APRIL INDUSTRIES, INC., ARTHUR FEDER, MORRIS DEMEL, NATHAN APTEKAR and STANLEY SILVER,

Defendants-Appellants,

and

ALEX M. PARKER,

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APPELLANTS' BRIEF

This is an appeal from an order of Judge Whitman Knapp, entered on July 2, 1974, in the United States District Court for Southern District of New York, which declared that the within action may be maintained as a class action, pursuant to FRCP 23(c)(1).

QUESTION PRESENTED

Did the plaintiffs sustain their burden of proof in establishing that questions of lawand of fact common to the members of the class predominate over any questions affecting only individual members; and their burden of proof establishing

the size of the proposed class?

FACTS

The complaint asserts that defendants, in violation of Rule 10b-5 of the Securities and Exchange Act of 1934, artificially inflated the earnings and prospects of defendant, APRIL INDUSTRIES,INC., by the use of false and misleading statements and press releases, thereby manipulating the market price of APRIL'S stock. The proposed class represents persons who purchased shares of stock between June 1, 1972 and December 18, 1972, the period during which the alleged statements were allegedly disseminated.

The complaint alleges that beginning in June, 1973, and continuing through December 18, 1972, the defendant corporation issued financial reports, predictions, and releases directly, and through securities analysts, with the intention that the statements made to the Securities Analysts be disseminated to the investing public with the knowledge that they would be relied upon,as well as those allegedly disseminated directly by the corporate defendant. The complaint alleges that the corporate defendant on December 17, 1972, corrected its report for the nine(9) months period ending September 30, 1972, which had been originally issued on or about November 10, 1972.

Plaintiffs STAEBLER and MYGATT, it is alleged,acquired their shares on or about July 16, 1970, and sold the same on or about December 22, 1972. Plaintiff PARKINSON acquired

shares on or about December 6, 1972, and apparently is still holding his shares.

It was established by the deposition of the plaintiff STAEBLER, given on October 10, 1973, that the acquisition of the stock by said plaintiff was acquired in the name of the plaintiff MYGATT, but in which plaintiff STAEBLER had a beneficial interest. It was also established that said plaintiffs' purchase was made as a result of a conversation made with one ROBERT GRUBER, a Security Analyst, who was in the employ of The Value Line Investment Survey, during a two(2) weeks period prior to the time said stock was bought. At that time the plaintiff STAEBLER was employed by the same employer as Mr. GRUBER. Mr. STAEBLER testified that the substance of the information orally given by Mr. GRUBER to him was ultimately published on August 4, 1972. Mr. STAEBLER'S testimony on deposition was that Mr. GRUBER orally stated his (Mr. GRUBER'S) opinion as to the financial position, sales prospects, characteristics of management of the corporate defendant. Mr STAEBLER stated that his purchase and the purchase of Mr. MYGATT was made solely on the basis of information obtained from Mr. GRUBER, and that if Mr. GRUBER thought that APRIL INDUSTRIES, INC., was a good buy at that time, and said no more, he would have made the purchase.

Plaintiff, PARKINSON, also gave a deposition in which he testified he purchased the company's stock on or about November 29, 1972, relying on newspaper reports of the company's quarterly earnings made about November 10, 1972 and Mr. GRUBER'S article in Value Line Reports, published August 4, 1972.

Mr. GRUBER, in a letter directed to the President of the corporate defendant dated August 2, 1972, enclosed a copy of his aforementioned article, dated August 4, 1972, in which he stated; "You may be especially interested on our forecast of your company's prospects for the period of the early seventies. We take full responsibility for these estimates, of course. They are based upon our evaluation of the current evidence and on certain assumptions regarding the future that are fully disclosed in the review."

Sub-joined to plaintiffs' motion to maintain the action as a class action are analysts' reports, concerning the company dated respectively October 19, 1972, October 25, 1972, August 1, 1972, and August 14, 1972, in addition to the aforementioned Value Line Report dated August 4, 1972.

The complaint alleges that members of the class exceed 500 persons, and in support thereof have attached as an exhibit to their motion papers to maintain this action as a class action a report of NASDAQ showing the date and volume of the shares traded in the corporation between June 1, 1972, and December 15, 1972. From this plaintiffs draw an inference,

supported by no other evidence that the members of the purported class is in excess of 500 persons.

POINT I

PLAINTIFF FAILED TO SUSTAIN THEIR BURDEN OF ESTABLISHING THAT QUESTIONS OF LAW OR FACT COMMON TO MEMBERS OF THE CLASS PREDOMINATE OVER ANY QUESTIONS AFFECTING ONLY INDIVIDUAL MEMBERS.

All three plaintiffs have stated that their purchase of the company's stock was based on the report of Value Line Selection and Opinion dated August 4, 1972, made by Mr.ROBERT GRUBER, its Securities Analyst, or made personally by Mr.GRUBER to the plaintiffs STAEBLER and MYGATT, prior to July 16, 1972.

In order that the questions of Law of Fact affecting the purported members of the class prodominate over questions affecting only individual members, these plaintiffs had the burden of establishing that all other members of the purported class relied on Mr. GRUBER'S report, orally or in writing, dated August 4, 1972. The moving papers are bare of any proof establishing that persons other than plaintiffs relied on MR.GRUBER'S report, predicatons and estimates. Since the class is constituted in the complaint as being purchasers of the stock between June 1, 1972 and December 15, 1972, it is manifest that these plaintiffs are not members of the same class, who purchased stock prior to the publication of Mr. GRUBER'S article August 4, 1972. For like reasons the facts as to persons who purchased the stock as a result of publication of reports of Securities Analysts eit-

her prior to or subsequent to Mr. GRUBER'S publication, dated August 4, 1972, are not the same facts as to the plaintiffs who relied solely on Mr.GRUBER'S article. The facts, therefore, with respect to those who made purchases prior to plaintiffs' purchases, and with respect to those who made purchases as a result of having read the publication of other Securities Analysts are different from the facts in the plaintiffs' case.

The court below in attempting to justify its conclusion that there are in fact common questions of law and fact, has asserted that the appellants herein overlooked the fact that plaintiffs' claim herein is also based upon the third quarter report ending September 30, 1972, which was later corrected. However the facts with respect to those who made purchases in the narrow time span between the publication of the original third quarter report and its subsequent correction are not the same facts with respect to those persons who purchased stock prior to the publication of the third quarter report, which was corrected shortly after its original publication. The court below erred when, in its opinion, it stated that there appear to be facts common to the class because,

> "according to plaintiffs theory any oral statements that were made to securities analysts andbrokers were made with the intent and purpose that they be disseminated to the public. During the latter part of 1972, various market reports and newspaper articles appeared which projected APRIL'S profits for 1972 in remarkable similar terms, from which plaintiffs infer that there was a single source-namely-defendants for the information contained in these reports."

The court below in support of its conclusion cited Seigel v. Realty Equities Corp., 54 F.R.D. 420. The facts in that case are completely at variance with the one at bar. In that case it appears that the defendant paid dividends in controvention of their agreement with creditors, and that these activities caused the market price of the securities to be inflated and would thus induce the public to purchase stock. That case does not factualy parallel this case, since the plaintiffs in this case did not rely on any inflated prices resulting from calculated misconduct in the payment of unauthorized dividends or otherwise, but on the projection of an Analyst who took full responsibilities therefor.

It would appear that the only predominate common fact with respect to those members of the class outlined by plaintiffs is that they purchased stock within the time period setforth.

The right to proceed as a class action is based on alleged misrepresentations orally made to various Securities Analysts with the intent that they be disseminated to the public, and which were made to the public by the publication of the reports of these analysts. The plaintiffs' claims result from oral information received prior to the publication of the report of any analyst, and subsequent to the earliest date fixed for the purchase of the stock of those persons in the class, It appears, therefore, that the facts with respect to

all of the members of the class cannot be typical. Judge Motley in Skydale v. Mates, CCH Fed. Sec. L. Rep. Sec. 93, 538 held,

> "Securities cases predicated on individualized oral or written representations have consistently and correctly been denied class action status."

Judge Motley denied the class action determination in said case, stating that the differences in representations and the reliances there present indicated that the plaintiffs' claims would not be typical or the claims or the defenses of the class. See also Morris v. Burchard, 51 F.R.D. 530; Moscarelli v. Stamm 288 F. Supp. 453.

Securities Analysts making similar reports, without direct proof of the source, can cause no proper inferences to be drawn as that drawn by plaintiffs, and presemably by the court below in its decision. An equally valid inference can be drawn that such reports were based, as were those of the Analyst, GRUBER, upon their own evaluation and assumptions.

In the case at Bar it is crystal clear that the questions of fact and law with respect to the class, as defined by the plaintiffs, as persons who purchased shares of stock between June 1, 1972 and December 18, 1972, do not and cannot predominate. This is so because these plaintiffs, two of whom purchased their stock in July, 1972, relied solely on the opinion of a single security analyst, whereas persons in the class who purchased stock prior to the dissemination of that analyst's report could not

have relied thereon. Persons who purchased stock during the narrow time period between the original publication of the company's third quarter statement and the correction thereof and who relied on the original publication, do not fit within the class of persons who purchased their stock prior to the original publication of,said report. Those persons within the class who purchased stock prior to the dissemination of analysts reports other than that of ROBERT GRUBER,on whose report all of the plaintiffs have relied, raise a different question of fact from that of these plaintiffs.

The burden of establishing a purported class action as a class action is on the plaintiffs. Clark v. Thompson,206 Fed. Supp. 539, affd., 313 F. 2d 637, cert. den. 375 U.S. 951; Bailey v. Patterson, 206 Fed. Supp. 67; Rossin v. So. Union Gas Co., 472 F. 2d 707; Miller v. Curtis,57 F.R.D. 108.

The facts as to the members of the purported class are patently different, depending upon when the purchase was made, the reason for which the purchase was made, the reliance on analysts' opinions, if any. Under the circumstances, the proposed class in actuality is not capable of definition, despite the purported definition of the plaintiffs. Unless the proposed class is capable of definition the action may not be maintained as a class action. Kriger v. European Health Spa, Inc. of Milwaukee, Wisc., 56 F.R.D. 104.

The court,in Denver v. American Oil Co.,53 F.R.D. 620,

at 629 held:

> "If the issue as to liability differs from proposed class member to proposed class member, there should be no class, because then, the predominance of factual and legal issue test is not met."

Under the circumstances in the instant case, before liability can be established, each plaintiff, or each member of the class would be required to prove the same casuality of effect between the purchase and the alleged misrepresentation of management.

POINT II

THE PLAINTIFFS FAILED TO ESTABLISH THEIR BURDEN OF PROOF THAT THERE IS SUBSTANTIAL MERIT TO PLAINTIFF CLAIMS, IN ORDER TO REPRESENT THE CLASS.

The moving papers in the court below contend that the issues of fact, common to the class, are; 1) Whether the statements allegedly made by the defendants to the securities analysts who prepared the reports which were disseminated to the public were false and misleading; 2) whether the nine months report for the period ending September 30, 1972, (prior to its correction) was false and misleading; and, 3) whether, as a result, the price of the stock was artificially inflated.

In order for these plaintiffs to fulfill their obligations of showing substantial merit to their claims, they were required to show that they made purchases of the stock as a result of misleading statements made by the defendants to a security analyst whose report was disseminated to the public,

on which these plaintiffs relied. The opposing papers in the court below not only contained categoric denials of the allegations that the defendants made false and misleading statements, but contained corroborating proof in a letter of the very analyst on whose report plaintiffs allegedly relied, in which the analyst himself took full responsibility for the estimates, evaluations and assumptions which these plaintiffs claim were false and misleading. No proof was submitted to overcome either the denials of the defendants, or particularly, the matters set forth in the letter of the analyst, ROBERT GRUBER.

Two of the plaintiffs purchased their stock months prior to the nine months report for the period ending September 30, 1972. Consequently, their purchase was not based on the statements contained in said report. The third plaintiff although having made his purchase subsequent to the nine months period, prior to its having been corrected, he likewise was guided in his purchase by the report of the analyst, ROBERT GRUBER.

It appears,therefore, that the plaintiffs failed, in its motion in the court below, to establish by convincing proof that there was and is substantial merit to the plaintiffs' own claims.

While the complaint fixes the class as those persons who purchased stock between June 1, 1972 and December 18, 1972, there has not been precisely drawn the bounds of any class who relied upon information obtained from analysts to whom management allegedly supplied misinformation.

It has been held that an essential prerequisite to a class action is the existence of a class whose bounds are precisely drawn. Dolgow v. Anderson,43 F.R.D. 472. It is clear from the foregoing, that although an attempt has been made to fix the bounds of the class to those who purchased stock between June 1, 1972 and December 18, 1972, there is no class which fits within said bounds.

The plaintiffs have failed to establish that they are members of the class, except for their dates of purchase. Under such circumstances they may not bring suit for a class of which they are not a part. Smith v. The Board of Education of Morrilton, 365, F. 2d 770; Huff v. N.D. Cass Co. of Alabama,463 F. 2d 375, cert. den. 410 U.S. 927; Seligson v. Plum Tree, Inc., 55 F.R.D. 284.

Not only did the plaintiffs fail to establish proof of merit to their claims, but they failed to establish any motivation for any alleged manipulation by the defendants. There is neither allegation nor proof that the defendants, or any of them,profited from alleged false and misleading statements.

There has been no attempt to establish by proof the conclusory statement that the defendants knew or should have known the unaudited nine months report was inaccurate when published. On the contrary, the court below had before it proof that the inaccurate report was immediately restated when it became known to management that the same did not conform to the

accounting procedures required by their independent auditors.

By reason of the foregoing, it is clear that these plaintiffs did not sustain their burden of proof to establish that there is substantial merit to their claims, and consequently should not have been permitted to have their action maintained as a class action.

POINT III

THERE WAS INADEQUATE PROOF TO ESTABLISH THE SIZE OF THE PROPOSED CLASS.

Plaintiffs have attempted to establish the size of the class by the submission of an exhibit showing the date and volume of the sale of the corporation's stock between June 1, 1972, and December 15, 1972. No proof was submitted with respect to how many stockholders were included in these trades. The court below assumed that by reason of the volume of shares traded alone, that the size of class,exceeded 500. The court supported its holding by quoting from a decision of Judge Tyler, in Fischer v. Kletz, 41 F.R.D. 377,394, that

> "The failure to state the exact number in the class does not preclude the maintenance of a class action."

While the exact number of the class need not be stated, there should be adequate proof that the size, even approximately, is sufficient to conform to the requirements of Rule 23. In this case there was no such proof. In Demarco v. Edens,390 F. 2d 836, the court stated;

> "It is fundamental that those seeking to maintain

an action as a class action must make a positive showing that it would be impracticable to deny /the/ request for class action determination."

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE ACTION AS A CLASS ACTION SHOULD BE DISMISSED.

Respectfully submitted,

WILBUR G. SILVERMAN
Attorney for Appellants
88-11 169th Street
Jamaica, New York 11432

us cour US COURT OF APPEALS: SECOND CIRCUIT

PARKINSON,
Plaintiffs-Appellees.

against

APRIL INDUSTRIES, INC.,
Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1027 Avenue St. John, Bronx, New York

That on the 15th day of NOV 1974 at 255 E. 42nd Street, NYC deponent served the annexed BRIEF upon

Shatzkin, & Cooper

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 15th day of NOVEMBER 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0416950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975